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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KAARE GILBOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the electronic transfer of funds is encompassed within 18 U.S.C. 2314, and whether the Circuit Court's holding that it is within the statute constitutes ex post facto legislation in violation of Article I Section 9 Clause 3 of the United States Constitution and a denial of due process in violation of the Fifth Amendment to the United States Constitution?

2. Whether 18 U.S.C. 3238 mandates the trial of a defendant in the state where he is arrested when the offenses were begun outside the jurisdiction of any

particular State or district, and whether the Circuit Court's conclusion to the contrary is in conflict with the plain wording of the statute and with the rulings in the First, Fifth and Ninth Circuits?

3. Whether the admission into evidence of an unrelated occurrence committed two years prior to the acts charged violates the Federal Rules of Evidence?

4. Whether the District Court had jurisdiction over the acts of a foreign national committed outside this country particularly where there is no extraterritorial provisions in the statutes under which he is charged, and whether the Circuit Court's holding that there was jurisdiction is in direct conflict with the Fifth Circuit's holding in *United States v. Columba-Collela*?

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OPINION IN THE COURT BELOW

The decision of the United States Court of Appeals for the Second Circuit, which gives the reasons for the affirmance of the judgment of conviction, is set forth in the Appendix at page 1a.

GROUNDS FOR JURISDICTION OF THIS COURT

Judgment of conviction was entered in the United States District Court for the Southern District of New York on December 11, 1982. The order of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction was entered on July 23, 1982 and the order of said Court denying the petition for rehearing was entered on August 24, 1982. This Court has jurisdiction to review the judgment of the Circuit Court by Writ of Certiorari pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article I, Section 9, Clause 3, Article III, Section 2, Clause 3, and Amendment V of the United States Constitution. These are set forth in the Appendix at pp. ???

STATUTORY PROVISIONS INVOLVED

This case involves 15 U.S.C. 1693; 18 U.S.C. 10; 18 U.S.C. 478; 18 U.S.C. 488; 18 U.S.C. 489; 18 U.S.C. 1343; 18 U.S.C. 2311; 18 U.S.C. 2314; 18 U.S.C. 3236; 18 U.S.C. 3237(a); 18 U.S.C. 3238; 21 U.S.C. 955a and 47 U.S.C. 153(f). These are set forth in the Appendix at pp. 10a-26a.

STATEMENT OF FACTS

This appeal raises for consideration the bases for the exercise of jurisdiction and venue over the extraterritorial acts of foreign nationals as well as the interpretation of several statutes. These issues arise from an alleged swindle in the ship brokerage in-

dustry. The Government has charged the petitioner Kaare Gilboe, Jr. with the crimes of fraud by wire in violation of 18 U.S.C. §1343 and transportation of stolen property in violation of 18 U.S.C. §2314.

An understanding of the facts of this case will be facilitated by defining certain terms commonly used in the ship brokerage industry, to wit:

1. A "ship broker" locates and arranges for the transportation of certain cargo on certain ships. A broker performs these services for a commission.

2. A "fixture" is an informal contract (often oral) between brokers providing for the transportation of certain cargo on leased ships.

3. A "charter party" is a written contract encompassing and, more particularly, setting forth the exact terms of the fixture.

4. "Freight" is the money paid for the transportation of the cargo. The money is normally paid to the ship broker who deducts his commission and forwards the balance to the ship owner.

5. "Tonnage" refers to cargo ships.

As to counts one and two of the indictment, the facts, in brief, are as follows:

Kaare Gilboe, Jr., a Norwegian citizen (residing at all relevant times outside the United States) was a ship broker. During the years 1978 and 1979 Mr. Gilboe was employed by the firm of Bundo Lines, Ltd., a Hong Kong based ship brokerage corporation.

In November, 1978, the government of the People's Republic of China wished to have grain that it had purchased in Argentina transported from Argentina to China. Bundo Lines acted as the broker for the Chinese government to secure ships for the transportation of the grain. In this capacity, it began to make inquiries in Hong Kong about available ships. Eventually, Libra Shipping, a Panamanian ship brokerage corporation with an office in Manhattan, responded

that it had suitable tonnage. A proposal was then made through Moller Steamship, a Norwegian corporation with offices in Hong Kong, to Libra for the use of their tonnage. A fixture was concluded and a charter party entered into in which Libra Shipping substituted Librand Shipping, Ltd., a British corporation for itself. This was done to avoid being subject to United States law, particularly the tax laws.

The ship provided by Librand for the transportation of the grain was the Kanishka, an Indian owned vessel of foreign registry. On January 26, 1979, the Kanishka, fully loaded with the grain, set sail for China. On February 3, 1979, the Chinese government wired the freight to the Bundo Lines' account in the Hong Lung Bank in Hong Kong. This money was then forwarded to Barclays Bank International, Ltd., New York for the credit of the account of Commonwealth Brokers, Ltd. in the Barclays Bank International, Ltd., Nassau, The Bahamas (Barclays New York acting only as transferee). The money was never sent to Librand Shipping or to the shipowners. As a result, the Chinese government was forced to pay the freight for the Kanishka directly to the shipowners, thereby paying the freight for that ship twice.

As to counts three through eight of the indictment, the Government alleges the following:

In 1980 Mr. Kaare Gilboe had relocated to Tokyo. With the consent of the manager of Tokyo Chartering, a ship brokerage corporation, he was allowed to use said corporation as a Telex and mailing address.

Howard Holder, Ltd., a London ship brokerage firm, was contacted by Mr. Gilboe and told that Gilboe had three ships available and that these ships were supposedly owned by Maritime Brokers, Ltd., which in turn was owned and controlled by Mr. Eddie Hsu. Howard Holder then contacted Clarkson's, another London ship brokerage firm, which had

Chinese grain in the United States Gulb that had to be transported to China. Clarkson's contacted the Chinese government and it agreed to have the Maritime Brokerage ships transport its cargo. Fixtures were concluded for three ships and charter parties followed. The three ships were named: The Oinoussian Superiority (Greek ownership); The Jaget Vijeta (Indian ownership); the Asian Adventures (Danish ownership). All of the above vessels were not registered in the United States.

In August the ships took on their cargoes and set sail for China. On August 26, 1980 the Chinese wired the freight to the New York branch of the Royal Bank and Trust Company, a Canadian bank, which then wired it to the account of Maritime Brokers, Ltd., in the First Cayman Trust Company, the Cayman Islands. The New York bank acted only as a transferee of the money.

The freight was never forwarded to Howard Holder, Clarkson's or the shipowners. It was later revealed that Eddie Hsu did not own the ships. Once again, the Chinese government was forced to pay the freight directly to the shipowners, thereby paying the freight twice.

Investigations of both of the above mentioned incidents took place in Hong Kong and Tokyo. Both investigations concluded that there was insufficient evidence to bring an indictment.

In August of 1981, approximately one year after the last incident is alleged to have occurred, Mr. Gilboe was arrested while in this country. He was arrested in Connecticut and brought to the Southern District of New York for trial. Following a seven day jury trial with the Honorable Richard Owne, District Judge, Kaare Gilboe was found guilty of all eight counts charged in the indictment. He was sentenced to the maximum on each count with sentences for the

first incident running concurrently and the sentences for the second incident running concurrently but the two incidents to run consecutively. Mr. Gilboe is presently incarcerated serving this twenty year sentence.

By a decision dated July 23, 1982 and entered on July 23, 1982 the United States Court of Appeals for the Second Circuit affirmed defendant's conviction in its entirety. Defendant's petition for rehearing was also denied in its entirety on August 24, 1982.

ARGUMENT

POINT I

THE ELECTRONIC TRANSFER OF FUNDS IS NOT ENCOMPASSED WITHIN 18 U.S.C. 2314, AND THE CIRCUIT COURT'S HOLDING TO THE CONTRARY CONSTITUTES EX POST FACTO LEGISLATION IN VIOLATION OF ARTICLE I SECTION 9 CLAUSE 3 OF THE UNITED STATES CONSTITUTION AND A DENIAL OF DUE PROCESS IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In upholding defendant's conviction under 18 U.S.C. 2314, the Circuit Court engaged in ex post facto legislation by improperly expanding §2314 to cover acts completely without the scope of said statute. The Circuit Court stated that whether §2314 covers the electronic transfer of funds is a question of first impression. However, the only way this can be considered a question of first impression is to ignore all the decisions which have held that §2314 is specific and inclusive and must be interpreted strictly within the confines of the items stated (see, e.g., *Merrill v.*

United States, 338 F.2d 763, 768 [5th Cir. 1964]; *Beam v. United States*, 364 F.2d 756, 759 [6th Cir. 1966]; *United States v. Jones*, 450 F.2d 523, 524 [5th Cir. 1971]; *United States v. Dunlop*, 573 F.2d 1092, 1094 [9th Cir. 1978]; *United States v. Jackson*, 576 F.2d 749, 755-756 [8th Cir. 1977]; *United States v. Young*, 210 F.Supp. 640, 642 [W.D.Mo. 1962]).

Section 2314 of title 18 provides in pertinent part as follows:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . .

Section 2311, the definitions section for the above statute, defines "money" and "securities" as follows:

> "Money" means the legal tender of the United States or of any foreign country, or any counterfeit thereof;
>
> "Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security", or any certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged,

counterfeited, or spurious representation of any of the foregoing.

This statute, as can readily be observed, is quite detailed and inclusive as to which items and what conduct fall within it. All of these items (over 20 specified) are "tangible" and the statute by its own terms requires that they be physically transported and does not include the electronic crediting and debiting of accounts. The legislative history of the statute also reveals that it does not, and was not intended to cover such electronic transfers (see Act July 9, 1956, 1956 U.S. Code Cong. and Adm. News, pp. 3036-3039; Pub. L. 87-371, 1961 U.S. Code Cong. and Adm. News, pp. 3264-3266; Pub. L. 90-535, 1968 U.S. Code Cong. and Adm. News, pp. 3654-3657). This legislative history reveals that Congress was very specific in delineating what items it wished to come within the purview of 18 U.S.C. Section 2314.

Despite varying viewpoints by numerous courts as to which documents fall within the boundaries of §2314, all of the cases involved documents. This has remained true even with the change in the wording of §2311 from "securities means" to "securities include", a change that some urged broadened the scope of the statute (see, *United States v. Speidel*, 562 F.2d 1129, 1131 [8th Cir. 1977]). Even then, the courts have held that certain documents still remain outside the scope of §2314 (see, e.g., *Streett v. United States*, 331 F.2d 151 [8th Cir. 1964]) wherein the Court held that traveler's checks with forged signatures were not included within the statute; *Merrill v. United States*, *supra*, 338 F.2d 763, credit card not included within §2314; *United States v. Jones*, *supra*, 450 F.2d 523, 524, §2314 does not include forged airline tickets; *United States v. Dunlop*, *supra*, 573 F.2d 1092, department store script held not to be within the scope of §2314).

While it is undoubtedly true that times change and with them our technology and habits, it frequently happens that the law as written does not cover abuses associated with these changes. A prime example of this as relates to §2314 was the proliferation of credit card use in the late 1950s. Despite numerous attempts to have stolen credit cards or charge slips included within §2314, the courts have repeatedly held that the statute as written simply does not cover them (see, e.g., *Merrill v. United States, supra*, 338 F.2d 763; *Beam v. United States, supra*, 364 F.2d 756; *United States v. Fordyce*, 192 F.Supp. 93 [S.D. Cal. 1961]; *Williams v. United States*, 192 F.Supp. 97 [S.D. Cal. 1961]; *United States v. Young, supra*, 210 F.Supp. 640; *United States v. Barnett*, 258 F.Supp. 455 [M.D. Tenn. 1965]).

The refusal to include certain documents within §2314 has been based on the time honored principle that criminal statutes must be strictly construed. In this regard it has been held:

> "Section 2314 is a criminal statute ' . . . which must be strictly construed.' *Prussian v. United States* (1931), 282 U.S. 675, 677, 51 S.Ct. 223, 75 L.Ed. 610. From the government's standpoint the most that can be said is that the meaning of the statute is not to be resolved by an interpretation 'to embrace offenses not clearly within the law.' *Krichman v. United States* (1921), 256 U.S. 363, 367-368; 41 S.Ct. 514, 516, 65 L.Ed. 992 (1921). *Any doubt must be resolved against broadening its scope. United States v. Adielizzo*, (2d Cir., 1935), 77 F.2d 841, 844." (*Merrill v. United States, supra*, 338 F.2d at 770; see also, *United States v. Dunlop, supra*, 573 F.2d at 1094). (emphasis supplied)

Rather than violate this fundamental principle of our democratic form of government, the courts in the past

have left it to the legislative branch to legislate. Preservation of this principle is crucial as it embodies the constitutional mandate of due process contained in the Fifth Amendment to the United States Constitution and the proscription of ex post facto legislation found in Article I Section 9 Clause 3 of the Constitution. Indeed, when Congress has seen criminal conduct falling outside the scope of §2314 they have amended the statute (e.g., in 1968 Congress amended §2314 to include traveler's checks bearing forged countersignatures within its scope. These had previously been held to be beyond the wording of the statute in *Streett v. United States, supra,* 331 F.2d 151).

When the modernization of commercial habits is so great however, as in the case of the electronic transfer of funds, a mere amendment of the statute is not enough. To cover abuses in this area, Congress was required to enact in 1978 a separate statutory scheme entitled "Electronic Fund Transfers" (15 U.S.C. §1693 et seq.). Congress saw the need to enact this new statute even though §2314 was on the books in one form or another for more than 40 years. Obviously, Congress would not have endeavored to enact a separate statute if §2314 did in fact cover the electronic transfer of funds.

In his brief before the Second Circuit, the U.S. Attorney stated (on p. 22) that "Wire transfers between banks are simply the modern means of transferring money", a position which the Circuit Court adopted. While this observation is true, it does not mean that §2314 can now be construed as covering these transfers. Instead, it merely underlines the reason for enactment of 15 U.S.C. §1693.

The Circuit Court and the U.S. Attorney's office, in advocating reconstruction of §2314 to cover the crime charged, have jeopardized the principle of strict

construction merely because of their ignorance of the laws which they are sworn to uphold. This is not a question of letting Mr. Gilboe's acts go uncharged and unprosecuted, if he did in fact violate a statute, but a question as to the proper manner which the legislature chose to regulate such conduct. The Second Circuit's position compounds the crime with which Kaare Gilboe is charged by adding the theft of the civil rights of 200 million Americans to his alleged theft of $5 million.

In its decision, the Circuit Court bases jurisdiction under 18 U.S.C. §1343 and the violation of §2314 on the same act which is the wiring of the funds to the Bahamas through a New York bank, *Pereira v. United States* (347 U.S. 1, 9 [1953]) however, requires that sections 1343 and 2314 each be supported by an independent basis, i.e., proof of a fact not essential to the other.

The statute begins with the words, "Whoever transports in interstate or foreign commerce". Clearly, the acts sought to be proscribed must involve the transportation in interstate or foreign commerce. However, the Circuit Court in its decision seems once again to add to the plain wording of the statute by speaking of "international transactions". Foreign commerce has a specific meaning, i.e., the transportation between the United States and another country (see 18 U.S.C. section 10; 47 U.S.C. section 153 [f]). By speaking in terms of international commerce the Court has broadened the scope of the staute so as to attempt to include the activities charged to Mr. Gilboe. The statute as written does not encompass those activities.

Finally, the dangers of the Circuit Court's decision can be most readily understood when considering the following principles enunciated by Chief Justice

Marshall in *United States v. Wiltberger*, 5 Wheat. 76, 95-96, 5 L.Ed. 37:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment. * * * The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

POINT II

18 U.S.C. 3238 MANDATES THE TRIAL OF A DEFENDANT IN THE STATE WHERE HE IS ARRESTED WHEN THE OFFENSES WERE BEGUN OUTSIDE THE JURISDICTION OF ANY PARTICULAR STATE OR DISTRICT, AND THE CIRCUIT COURT'S CONCLUSION TO THE CONTRARY IS IN CONFLICT WITH THE PLAIN WORDING OF THE STATUTE AND WITH RULINGS IN THE FIRST, FIFTH AND NINTH CIRCUITS.

In its decision, the Second Circuit held that §3238 was not applicable to the facts of the case. This statute in its entirety provides:

> §3238. Offenses not committed in any district
>
> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

The Circuit Court held instead that this case is governed by §3237(a) which states:

> §3237. Offenses begun in one district and completed in another
>
> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another,

> or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

The Circuit Court stated that §3238 "applies only to offenses 'not committed in any district,' as its title indicates." (It is interesting to note that the Circuit Court failed to include in its decision or to consider the title of §3237 which is, "Offenses begun in one district and completed in another". Surely if titles to statutes are to govern, §3237 is totally inapplicable to this case unless Hong Kong and Japan are now districts in the United States.) The Court, contrary to accepted principles of statutory construction, failed to consider the language of the statute itself rather than just its title. In looking at the actual language of §3238, it is apparent that this statute explicitly governs those situations where the offenses were *begun* outside the jurisdiction of any particular State or district. The Circuit Court could only reach its conclusion by completely ignoring the first seven words of §3238 as well as the fact that "begun or committed" are in the disjunctive. Once it is established that the offenses charged were begun outside any state or district then §3238 applies even if those offenses continued within a state or district. To construe §3238 as applying only to offenses committed completely outside of any state or district is to render the first seven words of this statute, and in particular the word "begun", meaningless. The First and Ninth Circuit Courts of Appeals have not considered the word "begun" to be mean-

ingless as they have applied §3238 in cases where offenses were begun outside the country and continued inside this country (*United States v. Castillo-Felix*, 539 F.2d 9 [9th Cir. 1976]; *United States v. Beliard*, 618 F.2d 886 [1st Cir. 1980]).

It must also be remembered that §3238 was amended in 1948 to include the words "begun or". The purpose of this amendment was to clarify the statute's scope (see, 18 U.S.C.A. §3238, "Reviser's Note"). If the statute was meant only to cover offenses committed completely outside this country, such an amendment was unnecessary since §3238 prior to the amendment already covered those situations. The amendment to §3238 was designed to make clear that §3238 fixes the locus of those crimes not complete either inside or outside this country. This manner of fixing the locus of a crime is also done by another venue statute, 18 U.S.C. §3236, for the crimes of murder or manslaughter. Furthermore, §3237(a) also contemplates the situation where a crime is not complete in any one place by its use of the words "any offense against the United States *begun in one district and completed in another*". (emphasis supplied). Clearly Congress understands the plain meaning of the word "begun" and uses it only when it will enforce their legislative purpose.

Under all versions of the facts in this case, the offenses charged to the defendant were begun outside the jurisdiction of any particular state or district of the United States. Counts one and two of the indictment were begun in Hong Kong, while counts three through eight were begun in Tokyo. Mr. Gilboe was arrested in Connecticut.

Article III Section 2 Clause 3 of the United States Constitution provides in pertinent part that "The trial of all crimes . . . shall be held in the State where said

crimes shall have been committed; *but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed*" (emphasis supplied).

Here, Congress by 18 U.S.C. Section 3238 did specifically provide where such trials should take place. In this case, that place can only be in the District of Connecticut. Moreover, the fact that one or more of the acts charged to Mr. Gilboe may have been committed in this country does not remove this case from the ambit of §3238 (*United States v. Williams*, 589 F.2d 210, 212-213 [5th Cir. 1979], *adopted in relevant part*, 617 F.2d 1063 [5th Cir. 1980] [*en banc*]; *United States v. Erwin*, 602 F.2d 1183 [5th Cir. 1979]).

While to some the placing of venue in Connecticut—a state with no apparent relation to the crimes in question—may seem arbitrary, this is precisely the intention of §3238. This statute deals only with crimes against the United States which were begun or committed outside the United States, thereby making their ties to any particular state tenuous. Consequently, rather than having various states squabbling over which one is to try the case, Congress arbitrarily fixed venue by statute. In applying §3238, it was held that venue for the trial of a United States citizen charged with having committed treason against the United States while in Germany was in Massachusetts, the state where the plane bringing the defendant to this country was forced down by mechanical problems, and not in Washington, D.C. where he was under indictment (*Chandler v. United States*, 171 F.2d 921, 932-933 [1st Cir. 1948]; see also, *Best v. United States*, 184 F.2d 131 [st Cir. 1950]). Similarly, 21 U.S.C. §955a subdivision (f) fixes venue for the violation of §955a ("Manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels") in "the United States district court at

the point of entry where that person enters the United States, or in the United States District Court for the District of Columbia" and not in the district where the controlled substances were manufactured, distributed or possessed. Again, Congress has arbitrarily fixed venue in a state or district which does not necessarily have a relation to the crime.

It should be observed at this point that venue of this action was totally in the control of the U.S. Attorney. He was the one who had the power to arbitrarily determine where Mr. Gilboe would be tried by having him arrested in Connecticut. His ignorance of the venue statute should not now permit him to escape the consequences of that decision.

Finally, venue is not a matter to be taken lightly and considered inconsequential. "In a criminal trial in the federal courts venue must be proved, in the absence of waiver, like any other materials allegation of the indictment, *U.S. v. Johnson*, 323 U.S. 273, 65 S.Ct. 249, 89 L.Ed. 236; *U.S. v. Brothman*, 2 Cir., 191 F.2d 70; *U.S. v. Jones*, 7 Cir., 174 F.2d 746" (*U.S. v. Provoo*, 215 F.2d 531, 537 [2d Cir.]; *U.S. v. Browne*, 225 F.2d 751, 755 [7th Cir.]).

POINT III

THE ADMISSION INTO EVIDENCE OF AN UNRELATED OCCURRENCE COMMITTED TWO YEARS PRIOR TO THE ACTS CHARGED VIOLATED THE FEDERAL RULES OF EVIDENCE.

As part of its case the Government introduced into evidence acts allegedly committed by the defendant which it maintained were part of a common scheme or plan. This included testimony about Mr. Gilboe's involvement in the chartering of two other ships—the Costanza M and the Aiolos—at the same time as the

chartering of the Kanishka. Also admitted in evidence as part of the Government's case in chief was testimony concerning an allegedly similar scheme which took place in the Philippines approximately two years before any of the transactions of the indictment.

A common scheme or plan is one so related in character, time and place of commission as to tend to support the conclusion that there was a plan or system which embraced both them and the crime which is charged (see *United States v. Gubelman*, 571 F.2d 1252, 1255 [2d Cir.]).

There is no doubt that the 1977 Philippines incident does not fall within the definitional framework of common scheme or plan as enunciated by any appellate court to date. The Phillippines incident involved a different brokerage firm, different victims and took place almost two years before the transactions alleged in the indictment. Clearly this was not in any way related to the actions charged in the indictment. Its admission violates Rule 404(b) of the Federal Rules of Evidence, as it could merely show a criminal disposition on the part of the defendant and only result in prejudice. Although one could argue that such evidence was probative of the defendant's knowledge and intent, this was not admitted as such evidence, as shown by the fact that it was introduced as part of the Government's case in chief. The Government in moving for the admission of this evidence stated the following in its memorandum of law:

> As noted above, the Government submits that since the similar evidence is relevant to common scheme or plan, it is admissible as part of the Government's case in chief. *United States v Figueroa, supra*, 618 F.2d at 939. If, however, the Court determines that it is not relevant to common plan, but only to knowledge and intent, then the proper procedure is for the Government to rest its case, reserving the right to reopen if

there is no defense case, and then to present the similar act proof in rebuttal or after reopening. *United States v. Figueroa, supra*, 618 F.2d at 939, n. 1.

Admission of this evidence during the case in chief was not a minor procedural defect. Rather, awaiting the conclusion of the defendant's case before ruling on its admissibility, "enables the trial judge to determine whether the issue sought to be proved by the evidence is really in dispute and if so, to assess the probative worth of the evidence on this issue against its prejudicial effect" (*United States v. Figueroa*, 618 F.2d 934, 939 [2d Cir.]).

In this case there was no such assessment. By improperly admitting the evidence of the Philippines transaction as part of a common scheme or plan, the trial court permitted this highly prejudicial testimony into evidence without determining whether the issue sought to be proved was really in dispute and, more importantly, whether its probative value outweighed its prejudicial effect. Since this testimony was not of a common scheme or plan, the trial court had absolutely no discretion to admit it as part of the Government's case in chief. Moreover, the improper introduction of this testimony into evidence should not be taken lightly. As stated in *United States v. Figueroa*, p. 939 *supra*:

> Despite the frequency with which these principles have been expressed and the reversals that have occurred when they have not been followed, *United States v. Mohel, supra; United States v. Manafzadeh, supra; United States v. O'Conner, supra; United States v. DeVaugn, supra*, the Government persists in jeopardizing convictions by offering evidence of similar crimes or acts either in disregard of the standards or without assisting the trial judge to make sure that they are correctly applied.

An even more prejudicial and harmful error occurred when the trial court admitted into evidence testimony concerning the Costanza M and the Aiolos. Although they may be considered part of a common scheme or plan, testimony concerning them could only be admissible if relevant to an issue in dispute (*United States v. Figueroa, supra*, 618 F.2d at 939). At the time the trial court admitted testimony concerning the Contanza M and the Aiolos into evidence the issue of identity and the commission of the act were not in dispute, nor did they arise at any time during the trial. While the Government and the trial court anticipated that knowledge and intent would be in dispute it is axiomatic, as the Government itself has stated, that such evidence must await conclusion of the defendant's case (*United States v. Figueroa, supra*, 618 F.2d at 939). Admission of this testimony at the beginning of the Government's case had the effect of coloring all subsequent testimony heard by the jury.

How many times must the appellate courts reiterate the proper procedure for the admission of evidence of common scheme or plan before the trial courts comply? Surely, the trial courts will permit such testimony only as long as they are secure in the belief that the appellate courts will somehow characterize the admission of this obviously prejudicial testimony as less than reversible error. It is indeed surprising that the Second Circuit which in the past so eloquently warned against improperly admitting similar act evidence chose in this case to not even discuss admission of this evidence.

POINT IV

THE DISTRICT COURT DID NOT HAVE JURISDICTION OVER THE ACTS OF THE DEFENDANT, A FOREIGN NATIONAL, COMMITTED OUTSIDE THIS COUNTRY PARTICULARLY WHERE THERE IS NO EXTRATERRITORIAL PROVISIONS IN THE STATUTES UNDER WHICH HE IS CHARGED AND THE CIRCUIT COURT'S HOLDING THAT THERE WAS JURISDICTION IS IN DIRECT CONFLICT WITH THE FIFTH CIRCUIT'S HOLDING IN *UNITED STATES V. COLUMBA-COLELLA*.

There has never been a case in which a nonresident alien has been tried for extraterritorial actions having no United States victims. The Circuit Court's holding that jurisdiction lies in this case is not supported by any known legal principle either in our statutes or comon law and is in direct conflict with the decision by the United States Court of Appeals for the Fifth Circuit in *United States v. Columba-Colella* (604 F.2d 356 [5th Cir. 1979]). Moreover, the Second Circuit's decision jeopardizes our position in the international legal system by its disregard of mutuality of comity between sovereign nations.

In discussing the extraterritorial effect of our criminal statutes, the Court in *United States v. James-Robinson* (515 F. Supp. 1340, 1342-1343 [S.D. Fla. 1981]) made the following cogent observations:

> [1, 2] International law has long been recognized as being part of our law. *The Paquete Habana*, 175 U.S. 677, 700 20 S.Ct. 290, 299, 44 L.Ed.2d 320 (1900); see *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1161, 1178-79 (E.D. Pa. 1980). It applies even in the absence of a specific treaty, and must be ascertained and applied by the Court when necessary. *Habana*, 175 U.S. at 700, 20 S.Ct. at 299.

An American statute may override international law, but only when Congress has expressed the clear intent to supersede the existing law of nations. *E.g., Murray v. The Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804); *see Cook v. United States*, 288 U.S. 102, 53 S.Ct. 305, 77 L.Ed. 641 (1933) (statute interpreted to conform with prior treaty); *Zenith*, 494 F. Supp. at 1179; Restatement (Second) of the Foreign Relations Law of the United States §§3(3), 145(1).

The law of this country, as well as England, is and has always been that an act done outside the country by a nonresident alien does not subject him to criminal jurisdiction in this country even though there may have been some consequences here (see, Halisbury's Laws of England, par. 74, "Extraterritorial Jurisdiction"; Oppenheim, International Law, sec. 147 [3rd ed. 1920]; *United States v. Bowman*, 260 U.S. 94, 43 S.Ct. 39; 67 L.Ed. 149 [1922]; *United States v. Columba-Colella, supra*, 604 F.2d 356). The only exception to this rule is when the consequences of the extraterritorial activity pose a clear detriment or danger to this country or its citizens (see, e.g., *Rocha v. United States*, 288 F.2d 545 [9th Cir. 1961]; *Rivard v. United States*, 375 F.2d 882 [5th Cir. 1967]; *United States v. Pizzarusso*, 388 F.2d 8 [2d Cir. 1968]; *Charon v. United States, 412 F.2d 657 [9th Cir. 1969]; United States v. Winter*, 509 F.2d 975 [5th Cir. 1975]; *United States v. Egan*, 501 F. Supp. 1252 [S.D.N.Y. 1980]).[1] The Circuit Court, contrary to these well established principles of domestic and international law, held that jurisdiction exists without even bothering to enunciate which basis supports jurisdiction. It is clear, however, that no basis for jurisdiction exists in this case.

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1. Any argument that *United States v. Davis* (608 F.2d 555 [5th Cir. 1979]) is contrary to these well accepted principles is without merit. In *Davis* there was a conspiracy in which overt acts were done inside the United States.

International law has recognized, in varying degrees, five bases of jurisdiction with respect to the enforcement of the criminal law (See Harvard Research In "International Law, Jurisdiction With Respect To Crime, 29 Am J. Int'l. L. Spec. Supp. 435, 445 (1935) [hereinafter cited as Harvard Research] *United States v. Pizzarusso, supra*, 388 F.2d 8).

The five bases of jurisdiction are as follows:

1. Nationality—jurisdiction based upon the nationality of the accused.

2. Passive Personality—jurisdiction is determined by reference to the nationality of the person injured.

3. Territoriality—jurisdiction based upon the commission of the act within the borders of the sovereign.

4. Protective—jurisdiction attaches where conduct outside the borders of the sovereign threatens its security or the operation of its governmental function.

5. Universality—jurisdiction is determined by the custody of a person committing acts which universally threaten the safety of all nations, e.g., hijacking, piracy, and white slavery (This basis for jurisdiction is obviously not applicable in this case).

(See, e.g., *Rivard v. United States, supra*, 375 F.2d 882 [5th Cir. 1967], cert. denied, 389 U.S. 884, 88 S.Ct. 151; *United States v. Pizzarusso, supra*, 338 F.2d 8; Harvard Research, p. 445).

Kaare Gilboe is a nonresident alien whose actions occurred outside the borders of this country with no detrimental effects to the United States government, its corporations or citizens. All of the alleged victims are either foreign shipowners, corporations or a foreign government. In the first incident (Counts One and Two), all of Mr. Gilboe's actions took place in Hong Kong. The ship, the Kanishka, was Indian owned and registered and its charterer was the People's Republic of China. Bundo Lines was a Hong Kong cor-

poration (Oceantrans is a Panamanian corporation). The brokerage firms alleged to have been victimized, Moller Steamship and Librand Shipping are Danish and English, respectively. Libra Shipping is a Panamanian corporation. Libra did have offices in Manhattan and numerous communications between Hong Kong and New York transpired before the conclusion of the Charter Party between Bundo Lines and Librand.

In the second incident (counts three through eight) all of Mr. Gilboe's actions took place in Japan. The Jaget Vijeta, Oinoussian Superiority, and Asian Adventure were Indian, Greek and Danish owned, respectively. They were all of foreign registry, and were chartered by the People's Republic of China. The brokerage firms Howard Holder and Clarkson's were English and all communications were outside of the United States. The only connection with the United States was the use of foreign banks located in Manhattan to act as intermediaries in the telegraphic transfer of funds from China to the Cayman Islands.

In applying these facts to the aforementioned bases of jurisdiction, it is obvious that jurisdiction cannot be found here based upon nationality. To reiterate, Mr. Gilboe was at all times a nonresident alien of the United States. Moreover, jurisdiction did not attach in this case under the passive personality basis since none of the persons allegedly injured were nationals of the United States. In addition, it is very questionable whether the United States courts are willing to apply this basis to obtain jurisdiction.

By the strict definition of territoriality, jurisdiction would not lie since the defendant was outside the U.S., in Hong Kong and Tokyo, when all the acts charged to him were allegedly committed. Our courts, however, have also developed the "objective territorial" theory of jurisdiction "as a means of expan-

ding the power to control activities detrimental to the state" (*United States v. Pizzarusso, supra*, 388 F.2d at p. 10). Justice Holmes defined this principle as follows:

> Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power. (*Strassheim v. Daily*, 221 U.S. 280, 285, 31 S.Ct. 558, 560, 55 L.Ed. 735 [1911]).

The Second Circuit Court of Appeals in discussing the objective territorial principle, has held:

> Underlying this principle is the theory that the "detrimental effects" constitute an element of the offense and since they occur within the country, jurisdiction is properly invoked under that territorial principle. See also Restatement (Second), Foreign Relations Law Section 18. (*United States v. Pizzarusso, supra*)

In this case it was never demonstrated, let alone alleged, that the acts charged to the defendant were intended to or did produce detrimental effects in the United States. Indeed, the Circuit Court does not, at any time in its decision, state that there were detrimental effects in this country. The reason is there simply were none.

As to Counts One and Two of the indictment, the acts committed outside the jurisdiction could only have produced a detrimental effect on the government of China, the shipowners who were all foreigners and a British corporation. Obviously, neither the U.S. nor anyone in this country suffered any detrimental effects as a result of the acts charged to the defendant.

With respect to the remaining counts of the indictment, a detrimental effect could only have been

felt by the Government of China, the foreign shipowners and two British ship brokerage firms. The only link alleged between the acts charged and this country is the use of a U.S. branch of a foreign bank to transfer money from China to the Cayman Islands. This can hardly be termed a detrimental effect on this jurisdiction under any view of the facts.

Examples of what courts have held to be a detrimental effect within this jurisdiction are drug smuggling (*United States v. Daniszewski*, 380 F. Supp. 113 [E.D.N.Y. 1974]; and theft and forgery of United States social security checks (*United States v. Fernandez*, 496 F.2d 1294 [5th Cir. 1974]). A detrimental effect of these kinds is clearly lacking in this case.

The Department of Justice has, in the past, recognized that jurisdiction cannot be exercised over foreign nationals absent a showing of knowledge or intent to cause an effect in or to the United States (*United States v. James-Robinson, supra*, 515 F. Supp. at 1343). During Congressional deliberations concerning enactment of 21 U.S.C. §955a, the Department of Justice expressed its belief that the bill did not comply with the principles of international law.

> "Under international law, a state *does not have jurisdiction* to proscribe the conduct in question . . . To have jurisdiction over . . . distribution of controlled substance by a non-U.S. citizen or foreign vessels on the high seas, the United States *must show an actual or potential effect within its territory.* It is doubtful that such an adverse effect could be demonstrated in the absence of intent to import the substance into the United States or knowledge that it will be imported". (Letter from Patricia M. Wald, Assistant Attorney General [April 11, 1979], *reprinted in* H.R. Rep. No. 323, 96th Cong., 1st Sess. 16 [1979]).

Here, there has been absolutely no showing of intent to cause an effect in the United States.

When Congress wishes to reach extraterritorial acts, their intentions are made known by language which is quite clear and specific. An example of this specific language is 21 U.S.C. §955a which provides in pertinent part as follows:

> §955a. Manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels
>
> Vessels of United States or vessels subject to jurisdiction of United States on high seas
>
> (a) It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.
>
> Citizens of United States
>
> (b) It is unlawful for a citizen of the United States on board any vessel to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.
>
> Vessels within customs waters of United States
>
> (c) It is unlawful for any person on board any vessel within the customs waters of the United States to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.
>
> Intent or knowledge of unlawful importation into United States
>
> (d) It is unlawful for any person to possess, manufacture, or distribute a controlled substance—
>
> (1) intending that it be unlawfully imported into the United States; or
>
> (2) knowing that it will be unlawfully imported into the United States.

As can be readily seen, subdivision (a) of this statute exemplifies the territoriality basis of jurisdiction; sub-

division (b) the nationality basis; subdivision (c) territoriality and subdivision (d) the objective territorial theory of jurisdiction. In contrast, the language of the two statutes under which Mr. Gilboe is charged, 18 U.S.C. §1343 and 18 U.S.C. §2314 contains no language even remotely indicative of a grant extraterritorial jurisdiction. Moreover, subdivision (d) of 21 U.S.C. §955a underscores the basic principle that jurisdiction exists over the extraterritorial acts of a nonresident alien only where those acts produce a detrimental effect to this country or were designed to do so. Where there is no detriment to the United States, but merely foreign victims, Congress requires that the acts be done within the United States and has enacted separate and detailed statutes to encompass such activity (see 18 U.S.C. §§478, 488 and 489). In this case there has been no showing of any detrimental effect actually produced or intended to be produced in this country and all of the acts charged to Mr. Gilboe were done outside this country.

Finally, under the protective basis for jurisdiction, all the elements of the crime occur in the foreign country and jurisdiction attaches since these actions have a "potentially adverse effect" upon security or governmental functions and there need not be any actual effect in the country as is required under the objective territorial principle (*United States v. Pizzarusso, supra*, 388 F.2d at 10-11). A completely foreign conspiracy to assassinate the President of the United States or to smuggle drugs into this country would fall within the protective basis of jurisdiction. The facts of this case certainly do not support jurisdiction under this basis.

In its decision, the Circuit Court seems to rely on *United States v. Sindona* (636 F.2d 792 [2d Cir. 1980], cert. denied 451 U.S. 912 [1981]) to support its finding of jurisdiction. In particular, the Court stated that

"jurisdiction under section 1343 is satisfied by defendant's use of the wires to obtain the proceeds of his fraudulent scheme." This, however, puts the cart before the horse: It is not the violation of a statute which gives a Court jurisdiction but rather jurisdiction which gives the Court the power to enforce a statute. Moreover, in *Sindona* there was no doubt that the extraterritorial acts of the defendant therein produced a severe detrimental effect in this country, i.e., the collapse of the Franklin National Bank, an F.D.I.C. insured bank. As already observed, there was absolutely no detrimental effect to the United States in this case, a fact tacitly acknowledged by the Circuit Court's and the U.S. Attorney's silence on the matter. In addition, it should be noted that 18 U.S.C. 1343 deals with radio and television communications as well as telephone communications. By virtue of the Circuit Court's holding, anybody transmitting such signals which happen to cross any portion of this country would be subject to jurisdiction here. Surely, it could not have been intended that the scope of United States jurisdiction would be so broad and, in any event, it would not be permitted under international law.

It sometimes happens that the courts will strain to find that jurisdiction exists in a particular case. In doing so, the courts are no doubt exercising their proper function of safeguarding the nation's laws. However, in this case there are strong countervailing policy considerations which argue against expansion of jurisdiction. Such considerations include but are not limited to the following:

1. The supposed victim of the first transaction asserted in the indictment is Librand Shipping, Ltd. which the U.S. Attorney contends is a wholly owned subsidiary of a Panamanian corporation that had of-

fices in New York. The choice of citizenship of Librand Shipping and Libra Shipping are for the purposes of avoiding United States laws such as its tax laws and S.E.C. regulations. Furthermore, this deal was deliberately structured to avoid being subject to U.S. law. Should we now give protection to those who have, in effect, blatantly said we will disregard your laws and not pay your taxes?

2. It is quite apparent that the crimes charged in the indictment have a very tenuous nexus with the United States. Subjecting the defendant to the jurisdiction of the courts in this country will be giving approval to foreign states trying our citizens for acts which have little or no relation to those states.

3. The two countries directly involved in this case, Britain and Japan, after conducting investigations, concluded that there were inadequate grounds for an indictment. United States involvement in this case was of a most tangential nature. If the United States felt itself responsible as a sort of policeman of the world to assume jurisdiction of every case where there were transmissions across our country from outside our borders, it would choke our congested courts which are now struggling to protect our own citizens.

In light of all of the above considerations, it is not surprising that there have been no prior cases in which a nonresident alien has been tried for extraterritorial actions having no United States victim.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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